FKW, Incorporated *and* International Brotherhood of Electrical Workers, AFL–CIO, Local Union 1141. Case 17–CA–15959

April 30, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On July 12, 1994, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] adopting the administrative law judge's dismissal of the complaint alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union. Thereafter, Electrical Workers Local Union 1141 (the Union) filed a petition for review with the District of Columbia Circuit Court of Appeals. On April 4, 1995, the court in an unpublished opinion vacated the Board's decision and remanded the case to the Board for further proceedings consistent with its decision.

In its decision, the Board found that the Respondent had not violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new wage and benefit scheme prior to bargaining to impasse with the Union. The Board adopted the following findings of the judge:

> Respondent implemented only those terms and conditions dictated by the [Federal Aviation Administration] contract and thereafter demonstrated its willingness to negotiate concerning terms and conditions not controlled by the contract. I further find that, because Respondent lacked the ability to negotiate concerning the matters prescribed by the FAA contract, its failure to do so did not constitute a refusal to bargain violative of the Act. [Footnote omitted.]

In reaching these conclusions, the judge had relied on testimony of an alleged expert witness that any payment by the Respondent of wages and benefits in excess of those set forth in the Respondent's contract with the FAA would violate that contract.

In its decision, the court rejected the above conclusions. It found, inter alia, that the alleged expert witness' testimony established ''at best that the FAA is not obligated to reimburse the Respondent for any wage expenses in excess of those specified in the contract.'' It further found that the witness' suggestion ''that [the Respondent] actually would violate the contract by paying wages in excess of those specified in that agreement'' was contradicted by the ''plain language of the contract, which states that 'the labor rates shown [in the contract] are the maximum allowable,' and that '[t]he contractor shall bear expenses in excess thereof.''' The court therefore concluded that the Board's decision had no support in the record and it remanded the case to the Board ''for further proceedings consistent with this order.'' Specifically, the court directed the Board to provide an appropriate remedy for the Respondent's refusal to bargain unless, on remand, ''the Board can ascertain a legitimate alternative basis for the conclusion that FKW [the Respondent] was contractually precluded from negotiating with the Union as to wages.''

On June 30, 1995, the Board notified the parties that it had accepted the remand and invited the parties to submit statements of position. The Respondent and the Union filed statements of position.

The Board has reconsidered this case in light of the court's decision and the parties' statements of position. The Board has decided to accept the court's decision as the law of this case and, for the following reasons, now finds that the Respondent has violated the Act as alleged.

The court found that the language of the contract between the Respondent and the FAA permitted the Respondent to exceed the wage rates specified there on condition that the contractor (here, the Respondent) would bear any additional expenses, i.e., the FAA would *not* reimburse the Respondent for any wages paid in excess of the contractual rates. We cannot now ascertain any ''legitimate alternative basis'' for finding that the Respondent's FAA contract *precluded* it from negotiating with the Union regarding wage rates and other terms and conditions of employment for the unit employees. Indeed, we find that the Respondent offers no ''legitimate alternative basis'' for such a finding in its statement of position.

We also note that the Respondent had previously raised before the judge the defense that the Union, based on its conduct during bargaining, had effectively waived the right to contest the Respondent's unilateral implementation. The judge found the waiver argument ''moot'' in light of his determination that the Respondent had not violated the Act.[2] The Respondent did not except to the judge's failure to find that the Union had waived bargaining, but the Respondent raises this argument again in its statement of position. The Respondent has arguably waived this contention by failing to except to the judge's failure to find waiver, and the court's remand did not specifically encompass this issue. Even assuming that the argument is properly before us, however, we conclude for the reasons stated below that the Union did not waive bargaining in this case.[3]

[1] 314 NLRB 289.

[2] See 314 NLRB at 291 fn. 10.

[3] The court instructed the Board that ''[u]pon remand, unless the Board can ascertain a legitimate alternative basis for the conclusion that FKW was *contractually precluded* from negotiating with the Union as to wages, it *must* provide an appropriate remedy for

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It is well established that during collective bargaining an employer has the obligation to refrain from making unilateral changes in the unit employees' terms and conditions of employment unless and until the parties have reached impasse on bargaining for the agreement as a whole.[4] In *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), the Board ''reiterated the general rule that the defense of waiver is not available to an employer during the course of negotiations for a labor agreement to succeed an expired one.''[5] The Board has recognized two limited exceptions to this general rule: (1) when a union responds to an employer's earnest bargaining efforts by insisting on continually avoiding or delaying bargaining and (2) when economic exigencies compel prompt action.[6] Contrary to the Respondent, neither of these circumstances is applicable here.

The Respondent contends that the Union effectively waived bargaining during December 1991 by breaching the parties' alleged prior agreement to engage in ''marathon bargaining'' after the FAA made its contract award on December 6. We note, however, that after the Respondent received the FAA award the parties met for bargaining on December 16 and 20, 1991, and the Union proposed a bargaining session for January 6, 1992. Although the Respondent asserts that timing was critical here because its FAA contract was effective January 1, 1992, and the Respondent needed to implement terms and conditions of employment as of that date that were consistent with the FAA contract provisions, we do not find that the FAA contract mandated such action on the Respondent's part. We stress the court's implicit finding that the Respondent could have legitimately paid wages and benefits in excess of those for which the FAA would reimburse it. In fact, the record evidence shows that the Respondent had access to additional funds in its FAA contract—its profits—that would have enabled it, if willing, to meet these economic proposals. Thus, we find nothing in the Respondent's contract with the FAA that prevented it from bargaining with the Union beyond its January 1 effective date or removed the Respondent from the coverage of labor laws generally applicable to employers. In these circumstances, we reject the Respondent's claim that the Union's alleged unwillingness to meet in ''marathon bargaining'' sessions over the Christmas holiday season constituted undue delay that justified its unilateral implementation on January 1.[7]

We further conclude that there were no ''economic exigencies'' in this case that forced the Respondent's unilateral implementation because, consistent with the court's decision, we find that the FAA contract allowed the Respondent to pay the unit employees wages in excess of the rates provided for in that contract if the Respondent was willing to bear the additional costs. Thus, the Respondent could have continued to bargain with the Union beyond the January 1 cutoff date that the Respondent unilaterally imposed on the bargaining process. In sum, it is clear that in this case the Respondent simply decided on its own to implement the terms of the FAA contract without fulfilling its bargaining obligation to the Union.[8] Accordingly, we find that the Respondent's unilateral changes in the employees' terms and conditions of employment violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent, on request of the Union, to restore retroactively the rates of pay and other terms and conditions of employment that existed in the bargaining unit before the Respondent's unilateral changes, and to make the unit employees whole by remitting wages and benefits that would have been paid in the absence

FKW's refusal to bargain [emphasis added].'' The issue of alleged union waiver, which our colleague finds has merit, is not the same as the issue of whether FKW was ''contractually precluded'' from negotiating, and thus there is a significant question whether the union waiver issue is appropriately before us on remand from the court.

In response to our colleague's comments that the General Counsel and the Charging Party do not suggest that the Respondent waived its argument, we note the following: (1) the General Counsel did not file any statement of position on remand in this case and therefore has made no arguments on any points discussed here, and (2) the Charging Party's statement of position, responding to the court's question of whether the Respondent was contractually precluded from negotiating, does not even address the union waiver issue. This is a far cry from indicating that the Charging Party believes the union waiver issue is properly before the Board for decision.

[4] See *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The Respondent has not argued here that the parties bargained to impasse.

[5] *Fire Fighters*, 304 NLRB 401, 402 (1991).

[6] See *Bottom Line Enterprises*, supra at 374.

[7] Following the FAA's contract award, the Union immediately met twice with the Respondent for contract negotiations and then proposed meeting again slightly more than 2 weeks after a break for the Christmas holidays. We cannot conclude, in these circumstances, that the Union waived or refused bargaining, or that it even unreasonably delayed bargaining, because we do not agree with the Respondent's argument that it was absolutely necessary for the parties to have come to an agreement by the January 1 deadline set by the Respondent.

[8] We stress that the Board's recent decision in *RBE Electronics of S.D.*, 320 NLRB 80 (1995), further explicating the ''economic exigencies'' exception noted in *Bottom Line*, does not warrant a finding in this case that the Respondent's implementation of unilateral changes was justified. We note, inter alia, that the Union did not waive its right to bargain nor did the parties reach impasse on the matter proposed for change. Thus, the Respondent cannot avail itself of the *Bottom Line* limited exception described in *RBE Electronics, supra*.

of the changes from January 1, 1992, until the Respondent negotiates in good faith with the Union to agreement or to a bargaining impasse. The payment of back wages shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent also shall remit any payments it owes to employee benefit funds and reimburse its employees for any expenses resulting from the failure to make these payments in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).[9] Any amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time master electricians, industrial electricians and electrician helpers employed by the Respondent at the Mike Moroney Aeronautical Center, Oklahoma City, Oklahoma, but excluding all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventive maintenance employees, telecommunications manager, office clerical employees, guards, and supervisors, as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material here, the Union has been and is the exclusive collective-bargaining representative of the employees in the unit described above.

5. By unilaterally implementing changes in the unit employees' wages and other terms and conditions of employment in the absence of a bargaining impasse, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, FKW, Incorporated, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with International Brotherhood of Electrical Workers, AFL–CIO, Local Union 1141 as the exclusive bargaining representative of the employees in the following appropriate unit by unilaterally implementing changes in wages and other terms and conditions of employment in the absence of a bargaining impasse:

> All full-time and regular part-time master electricians, industrial electricians and electrician helpers employed by the Respondent at the Mike Moroney Aeronautical Center, Oklahoma City, Oklahoma, but excluding all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/pipefitters, mill wrights and helpers, journeymen carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventative maintenance employees, telecommunications manager, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of the Union, restore retroactively the rates of pay and other terms and conditions of employment that existed in the bargaining unit before its unilateral changes and make the unit employees whole by

[9] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondent will reimburse the employees, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

remitting all wages and benefits that would have been paid in the absence of the changes, plus interest, from January 1, 1992, until it negotiates in good faith with the Union to agreement or to a bargaining impasse.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Oklahoma City, Oklahoma, copies of the notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall by taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER COHEN, dissenting.

I believe that the Respondent's actions were privileged in light of the Union's refusal to engage in the intensive bargaining that was required in the circumstances.

In brief, the relevant facts are as follows: On September 10, the parties agreed to suspend bargaining until it could be determined whether the Respondent would be awarded a contract with FAA. The parties agreed that if and when the FAA contract was awarded they would commence ''marathon bargaining.''

On December 6, the Respondent learned that it had been awarded the FAA contract effective January 1. It then sought to engage in the previously agreed-upon ''marathon bargaining.'' The Respondent's reasons for doing so were obvious. The FAA contract provided for a labor-cost reimbursement that was lower than the Respondent's then-current terms and conditions of employment. The Respondent wanted an agreement that would comport with the labor-cost reimbursement from FAA. If it could not obtain that reduction, it would have to pay the difference from its own pocket.

The parties met on December 16 and 20. However, no agreement was reached. The Respondent then sought meetings on December 21, 23, and 24. The Union refused to meet until January 6, i.e., after the Respondent started performance of the FAA contract.

In sum, the Respondent had a legitimate and substantial reason for seeking intensive bargaining in December. The Union, in breach of its promise, refused to engage in such bargaining. The Union's sole reason for refusing to do so was that its negotiator wanted to be on vacation during the Christmas season. Although I can well understand these personal considerations, I must also consider the Respondent's legitimate interest in trying to resolve employment terms prior to January 1. I must also take into account the Union's refusal to live up to its agreement to engage in marathon bargaining. In these circumstances, I would find that the Respondent, having tried to use the collective-bargaining process, was free to act on January 1.[1]

My colleagues suggest that the Respondent ''arguably waived'' the contention which forms the essential basis for my dissent. Interestingly, the General Counsel and the Charging Party do not make a ''waiver'' argument. And, indeed, my colleagues cannot quite bring themselves to say that there was in fact such a waiver. There is a good reason for this. The position has no merit. That position focuses on the Respondent's failure to except to the judge's decision. However, the judge found for the Respondent on other grounds and did not reach the contention involved here. He therefore found that the issue raised by that contention was moot. From the Respondent's standpoint, the judge was clearly correct in both respects. Thus, exceptions were neither necessary nor warranted.

My colleagues also suggest that the contention involved herein is not properly before the Board. Again, neither the General Counsel nor the Charging Party makes the suggestion offered by my colleagues. Indeed, even though the Respondent explicitly made the contention in its postremand brief to the Board, neither the General Counsel nor the Charging Party argued in response that the contention is not properly before the Board. In sum, although my colleagues say that there is a ''significant question'' as to whether this contention is appropriately before the Board, the fact is that only my colleagues, and not the parties, have raised this question. In any event, the answer to the question is that the Board may properly address the issue. The contention has been made in this case from the outset, and it has never been abandoned. To the contrary, the Respondent has now renewed that contention. For the reasons set forth here, I conclude that the contention is correct.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] See *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). In that case, the Board reaffirmed that there are two exceptions to the general rule which precludes unilateral action in the absence of an overall impasse. The first exception concerns dilatory tactics by the union. The second exception concerns economic exigencies. The opinion then goes on to further explicate the second exception. The instant case turns on the first exception, and it is unnecessary to reach the second exception.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain collectively with International Brotherhood of Electrical Workers, AFL–CIO, Local Union 1141 as the exclusive bargaining representative of the employees in the following appropriate unit by unilaterally implementing changes in wages and other terms and conditions of employment in the absence of a bargaining impasse:

> All full-time and regular part-time master electricians, industrial electricians and electrician helpers employed by us at our Mike Moroney Aeronautical Center, Oklahoma City, Oklahoma, but excluding all other employees including Q.A. specialists, master industrial HVAC, journeymen HVAC, helper HVAC, boiler mechanics/- pipefitters, mill wrights and helpers, journey- men carpenters, master plumbers and helpers, painters and helpers, elevator mechanics and helpers, fire suppression technicians, pest control technicians, laborers, maintenance trade helpers, water treatment specialists, electronics technicians, CCMS team leader, CCMS operators, CCMS surveillance employees, warehouse team leader, computer programmer/analyst, computer hardware technician, O&M electromechanical technicians, equipment mechanics, preventative maintenance employees, telecommunications manager, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request of the Union, restore retroactively the rates of pay and other terms and conditions of employment that existed in the bargaining unit before our unilateral changes and make the unit employees whole by remitting all wages and benefits that would have been paid in the absence of the changes, plus interest, from January 1, 1992, until we negotiate in good faith with the Union to agreement or to a bargaining impasse.

FKW, INCORPORATED